(3)

No. 01-1099

IN THE

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, *ex rel.* BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL TURPEN and RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly affirmed the District Court's 12(b)(6) dismissal of Plaintiff's § 1983 Civil Rights Complaint on the following grounds and for the following reasons:

   (a) Pawnee County is not liable for the acts of its district attorney because in Oklahoma a district attorney is an arm of the state, not the county;

   (b) As such, a district attorney is a state actor entitled to Eleventh Amendment immunity;

   (c) The district attorney enjoys absolute prosecutorial immunity;

   (d) Although Petitioner argued that the district attorney's acceptance of the help offered him by privately-funded research assistants and investigators violated a state statute, namely, Okla. Stat. tit. 19, § 215.4, there was no showing that it violated a clearly established federal right secured to Petitioner by the United States Constitution; accordingly, the district attorney is entitled to qualified immunity;

   (e) The private defendants' funding, and arranging for, research assistants and investigators to assist in the state's analysis of a double homicide, in and of itself did not violate Petitioner's civil rights;

(f) The doctrine of issue preclusion required the federal court to find probable cause for the arrest and prosecution of Petitioner because the state court twice found probable cause sufficient to bind plaintiff over for trial;

(g) A federal due process violation does not occur simply because private monies are used to hire research assistants and investigators to help the state in its investigation of a double homicide;

(h) A Fourth Amendment claim for malicious prosecution under § 1983 cannot be maintained absent factual allegations indicating a lack of probable cause for arrest and prosecution; and

(i) General allegations unconnected to a specific defendant and/or which do not implicate a federal right secured by the United States Constitution will not support a § 1983 claim.

2. Whether the Court of Appeals correctly affirmed the District Court's 12(b)(6) dismissal of Plaintiff's § 1983 Civil Rights Complaint in light of the fact that Plaintiff's proposed amendment to the Complaint did not change any of the substantive allegations.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., is a professional corporation, and no parent company and no publicly held company owns 10% or more of its stock.

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Rule:

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STATUTE INVOLVED

Title 19, Oklahoma Statutes, Section 215.4

> The district attorney, assistant district attorneys, or special assistant district attorneys authorized by subsection C of Section 215.37M of this title, shall appear in all trial courts and prosecute all actions for crime committed in the district, whether the venue is changed or not; the district attorney or assistant district attorneys shall prosecute or defend in all courts, state and federal, in any county in this state, all civil actions or proceedings in which any county in the district is interested, or a party unless representation for the county is provided pursuant to subsection A of Section 215.37M of this title; and the district attorney or assistant district attorneys shall assist the grand jury, if required, pursuant to Section 215.13 of this title. The district attorney may at all times request the assistance of district attorneys, assistant district attorneys or district attorney investigators from other districts who then may appear and assist in the prosecution of actions for crime or assist in investigation of crime in like manner as assistants or investigators in the district.

STATEMENT OF THE CASE

1. Petitioner's Complaint

Petitioner alleged that on the evening of June 26, 1992, he went out to keep watch over his family's rural acreage in Pawnee County, Oklahoma. (Complaint, ¶¶ 11, 12 and 13).

Petitioner thereupon encountered Tony McCollum ("McCollum") and Fred Head ("Head"), two men whom Petitioner believed were avid racoon hunters with no respect for landowners' rights. (Complaint, ¶¶ 13, 17 and 18). Petitioner shot and killed the two men. (Complaint, ¶ 10.a).

Petitioner was the only one to survive this encounter. (Complaint, ¶¶ 13, 14, 23, 24, 25 and 26). Later that evening, Petitioner would reenact the events for police, voluntarily give the police a written statement and undergo several hours of interrogation. (Complaint, ¶¶ 25 and 26).

Petitioner was subsequently charged with two counts of first-degree murder and bound over for trial. (Complaint, ¶¶ 30 and 33). A Pawnee County jury acquitted Petitioner on charges of murder and/or voluntary manslaughter of Head. (Complaint, ¶¶ 10.c and 36). After the same jury failed to reach a unanimous decision regarding Petitioner's killing of McCollum, the State amended the charges against Petitioner and retried him for voluntary manslaughter.[1] (Complaint,

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1. Petitioner's Complaint inadvertently says that Petitioner was tried a second time for first degree murder. All parties stipulated in the First Amended Joint Case Management Plan to the following facts: (1) On the evening of **June 26, 1992**, Petitioner encountered Tony McCollum and Fred Head. (2) Petitioner shot and killed both Head and McCollum. (3) Petitioner was prosecuted for the first degree murder of both Head and McCollum. Petitioner asked for and received instructions on voluntary manslaughter and self-defense. (4) On **September 18, 1993**, a Pawnee County jury acquitted Petitioner of the murder and voluntary manslaughter of Fred Head. The same jury failed to reach a unanimous decision regarding Petitioner's killing of McCollum. The court declared a mistrial. (5) The State of Oklahoma amended the charges against Petitioner and retried him for the voluntary manslaughter of

(Cont'd)

¶¶ 36 and 37). A Pawnee County jury once again failed to reach a unanimous decision and another mistrial was declared. (Complaint, ¶ 39). A third prosecution for the voluntary manslaughter of McCollum was dismissed without prejudice. (Complaint, ¶¶ 34, 35 and 39).

Petitioner complains that privately-funded research assistants and investigators helped the state research and investigate the double homicide and that the Respondents funded, arranged for, or accepted, such private assistance in violation of Petitioner's civil rights. (Complaint, ¶¶ 31 and 32).

2. Rule (12)(b)(6) Motions to Dismiss Petitioner's Complaint

All six Respondents filed Motions to Dismiss Petitioner's Complaint. Respondent Pawnee County, ex rel. Board of County Commissioners ("Pawnee County" or "County"), argued that an Oklahoma county is not responsible for the acts or omissions of the State's District Attorney. Respondent Larry Stuart ("the State's District Attorney" or "Stuart") was sued solely in his official capacity as District Attorney of Osage and Pawnee Counties. Stuart argued that Petitioner's Complaint against him was barred by the Eleventh Amendment. He also argued that Petitioner's claims were predicated solely on his prosecution for murder and/or voluntary manslaughter, and as such, were barred by either

(Cont'd)

McCollum.On **January 26, 1996,** a Pawnee County jury once again failed to reach a unanimous decision and a mistrial was declared. (6) On **September 18, 1998,** a third prosecution for the voluntary manslaughter of McCollum was dismissed without prejudice. (First Amended Case Management Plan, pages 3-4).

absolute prosecutorial immunity or by the doctrine of qualified immunity.

Respondents Harland Stonecipher ("Stonecipher"), the Oklahoma Sportsman's Association ("Sportsman's Association"), Michael Turpen ("Turpen") and the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. ("RANTOL"), (collectively, "the private Respondents"), argued that Petitioner's claims were defective on numerous grounds, each of which was fatal to Petitioner's action against Respondents.

3. Petitioner's Motion to Amend His Complaint

Petitioner responded with briefs in opposition to Respondents' motions to dismiss and also filed a motion to amend his Complaint to join the State's District Attorney, Stuart, "in his individual capacity," as an additional party defendant. Despite the passage of nine months, Petitioner never moved the court for leave to amend the substantive allegations of his Complaint.

4. The Magistrate's Report and Recommendation Approved and Adopted by the District Court

In the face of Pawnee County's Motion to Dismiss, Petitioner conceded that the County was not liable for the acts of its district attorney. Without facts that the County took action against him, Petitioner could do little more than rely on vague and unsupported allegations against the County. In the face of Stuart's claims to Eleventh Amendment immunity and absolute prosecutorial immunity, and if added as a defendant in his individual capacity, his claim to qualified immunity, Petitioner argued that Stuart's actions violated

Okla. Stat. tit. 19, § 215.4, but he was unable to show that Stuart's use of privately-funded research assistants and investigators violated a clearly established federal right secured to Petitioner by the United States Constitution. Stuart was therefore entitled to qualified immunity.

The magistrate judge held the Eleventh Amendment barred Petitioner's action against Stuart in his official capacity. He also found that the activities of which Petitioner complained were "undertaken [by Stuart] specifically for the purpose of prosecuting [Petitioner]." Accordingly, he held such activities absolutely privileged as coming within the ambit of initiating, pursuing and presenting the state's case in a criminal prosecution.

The magistrate judge further held that Petitioner's motion to join Stuart "in his individual capacity" would be futile; the amended Complaint would be defeated by either absolute prosecutorial immunity or qualified immunity whether Stuart was named in his official *or* personal capacities.

Petitioner's § 1983 claim against the private Respondents was premised on their alleged conspiracy with the County and Stuart to solicit and accept private monies to help the state research and investigate the double homicide. Petitioner could not identify, however, a federal constitutional or statutory right violated by Respondents' alleged conduct. Nor could Petitioner establish the common law elements of malicious prosecution. The doctrine of "issue preclusion" required the magistrate judge to find probable cause for Petitioner's arrest and prosecution because the state court twice found probable cause sufficient to bind plaintiff over for trial. Because Petitioner's proposed Amended Complaint would not cure these fatal deficiencies, the Complaint was dismissed with prejudice.

Following a *de novo* review of the record, the District Court adopted and affirmed the Magistrate's Report and Recommendation and granted each of the Respondents' respective Motions to Dismiss and denied Petitioner's Motion to Join Additional Party Respondent. Petitioner appealed.

5. The Tenth Circuit Court of Appeals' Decision

Following a *de novo* review of the record, the Tenth Circuit Court of Appeals "agree[d] with the magistrate judge's analysis,"and in addition to those reasons set forth in the Magistrate's Report and Recommendation, articulated three more reasons why the Complaint merited dismissal. First, a federal due process violation does not occur simply because private monies are used to hire research assistants and investigators to help the state investigate a double homicide. Second, a Fourth Amendment claim for malicious prosecution under § 1983 could not be maintained by the Petitioner absent factual allegations indicating a lack of probable cause for his arrest and prosecution. And finally, general allegations unconnected to a specific defendant[2]

2. For example, Petitioner makes one or two extraneous allegations in his Complaint about unnamed individuals who attended Petitioner's trial and are alleged by him to be members of the Sportsman's Association; the alleged disruptive acts of these anonymous and faceless people cannot be attributed to any of the Respondents. Petitioner also complains that the trial judge responded in disgust to his request – made six years after he was acquitted for the first degree murder and/or voluntary manslaughter of Head – to have the bullet fragments removed from Head's body and returned to him. Petitioner characterized the judge's comments as being warrantless and showing "the bias and vengeance that *Pawnee County representatives* unnecessarily harbor toward Erikson." (Complaint, ¶ 10). At another place in his Complaint, he alleges that the Sportsman's Association "*and other unknown sources*" urged Pawnee County to relentlessly pursue a second trial for the McCollum homicide after the first trial ended with a hung jury. (Complaint, ¶ 40).

and/or which do not implicate a federal right secured by the United States Constitution will not support a § 1983 claim.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS FOR WHICH PETITIONER SEEKS REVIEW ARE NOT PRESENTED IN THIS CASE

As an initial matter, this Court should deny review because the "Questions Presented," for which petitioner seeks review, are simply not presented by this case.

In Question One, petitioner attacks the dismissal of his Complaint for lacking specificity of the kind dealt with in this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). *Crawford-El* required specific allegations that the public official defendant acted with wrongful motive. *Id.* at 597-98. This question is simply not presented.

Of the nine grounds given by the courts below for dismissing Petitioner's Complaint (these nine reasons are set forth underneath Question One in this Brief in Opposition at pages i and ii), none of them suggest that Petitioner's Complaint should be dismissed based on insufficient wrongful motive allegations against the defendant Stuart. Many of the reasons given by the three reviewing courts, not the least of which is that Petitioner failed to allege a federal constitutional violation, are sufficient in and of themselves to warrant dismissal.

II. PETITIONER'S REQUEST FOR A FOURTH DE NOVO REVIEW OF THE RECORD IS A MISUSE OF JUDICIAL RESOURCES

After a complete review of the record in this case, the magistrate judge entered a well-reasoned nine-page Report and Recommendation. Petitioner filed his objection thereto. After conducting a *de novo* review, the district court affirmed the Magistrate's Report and Recommendation. Petitioner appealed. On appeal, the Tenth Circuit Court of Appeals conducted another *de novo* review. The Court of Appeals "agree[d] with the magistrate judge's analysis,"and articulated three additional reasons why the Complaint merited dismissal.

Petitioner's case is insubstantial. His belief that he would have never been prosecuted but for the interest shown by the Oklahoma Sportsman's Association is ludicrous. As told by the Petitioner himself, both in his written statement to the police and in his testimony at trial, on the night of the homicides Petitioner exited his truck with a loaded rifle in hand to confront Tony McCollum. Tony held only a flashlight. As the two men exchanged words, Petitioner lost his temper. They were then joined by Fred Head, a friend of Tony's. Head got out of his vehicle and a scuffle ensued. Head reached for Petitioner's rifle and was shot. He dropped to the ground. Except for a dog leash, Head was unarmed. Petitioner turned to fire a shot at the non-combative and unarmed McCollum. Petitioner shot McCollum in the back and killed him. Petitioner returned to where Head lay on the ground and found him moving his arm. Petitioner then shot Head at close range and killed him. Petitioner was the only surviving witness. He said that Head hit him with the dog chain and that his actions were therefore justified under the doctrine of self-defense. That was the question for the jury.

III. PETITIONER MOVED TO AMEND HIS COMPLAINT TO ADD LARRY STUART IN HIS INDIVIDUAL CAPACITY; IN NINE MONTHS, HOWEVER, HE NEVER MOVED THE COURT FOR LEAVE TO AMEND ANY OF THE SUBSTANTIVE ALLEGATIONS IN HIS COMPLAINT

Petitioner moved to amend his Complaint and the magistrate judge took this into consideration in his Report and Recommendation:

> Plaintiff requests that Larry Stuart, individually, be joined as a defendant in this case. In his official capacity Defendant Larry Stuart has lodged an objection, arguing that such an addition would be futile because, even in his individual capacity, Larry Stuart would be entitled to absolute prosecutorial immunity and qualified immunity.
>
> * * *
>
> . . . The undersigned RECOMMENDS that Plaintiff's Motion to Join Additional Party Defendant be DENIED as Plaintiff would be unable to state a claim upon which relief may be granted against Larry Stuart in his individual capacity.

See Magistrate's Report and Recommendation, pages 5-7.

Despite the passage of nine months, Petitioner never moved the court for leave to amend the substantive allegations of his Complaint.[3]

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3. At the Case Management Conference, the district court, *sua sponte*, did offer Petitioner the opportunity to provide the court with (Cont'd)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Cont'd)
a "Factual Statement of the Case." Petitioner took this opportunity to file an "Aid the Court," but this document was insufficient to cure the fatal deficiencies in Petitioners' complaint.